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Supreme Court, U.S.
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MICHAEL RODAK, JR.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1689

STANDARD INDUSTRIES, INC., a corporation, and METROPOLITAN PAVING CO., INC., a corporation,

Petitioners,

VERSUS

MOBIL OIL CORPORATION, a corporation, SUNRAY-DX OIL COMPANY, a corporation, KERR-McGEE CORPORATION, a corporation, and PHILLIPS PETROLEUM COMPANY, a corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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STATEMENT

Respondents' basic argument is that the giving of the "trebling" instruction was correct, and that this Court, therefore, should deny Petitioners' request for certiorari review. This Brief is submitted, pursuant to the permissive provisions of Rule 24.3, in reply to that argument. Respondents seek to support their position here, as in both courts

below, almost solely by reliance on the alleged "misconduct" of a witness called to the stand by Petitioners. The facts in the record simply do not support Respondents' charge of "misconduct." However, even if all Respondents' allegations *were* absolutely true, the entire situation as described by them *still* would have nothing whatever to do with the question of the propriety of instructing a jury, in a *Sherman Act* case, that its verdict would be trebled. Such an instruction is simply not the proper solution to alleged witness misconduct. If the instruction was improper because it contravened the purpose of the nation's antitrust laws, it could not be changed into a proper instruction simply because of the *unrelated* misconduct of a witness. The "reason" advanced by Respondents is, in truth, no more than an excuse for imparting patently prejudicial information to a jury.

A. The Pertinent Facts

As indicated above, quite aside from the fact that Respondents' argument is a classic *non-sequitur*, it rests upon the totally inaccurate assumption that there *was:* (a) misconduct, involving (b) a "whispered" remark to the jury. In the words of Respondents:

> "The Court in *two* instances sustained objections *to such questions, after which* the witness *mumbled under his breath*, that he had borrowed and contributed One Hundred Fifty Thousand Dollars." Respondents' Brief, pages 2-3 [Emphasis supplied here, and throughout this Brief unless otherwise indicated].

Contrary to the above quoted assertion, the trial court did *not* sustain objections to the *same* questions, and the record so reflects [pages 2363-2366 of the Transcript and A. 1149-1151, R. 15, pp. 2461-2462; A. 1642-1644, R. 22, pp. 3695-3698; A. 1232-1235, R. 16, pp. 2628-2630]. The questions covered *different* subjects (which were addressed, in both instances, to matter initially delved into by the Respondents). Although the court clearly sustained an objection to the first line of questioning, it is certainly incorrect to state, as do Respondents, that the witness deliberately testified to a matter to which a previous objection had been sustained. The record makes apparent that the Trial Court Judge never fully realized that the first question put to the witness by Petitioners' counsel (to which an objection *was* sustained) was entirely different from the question to which an answer was given simultaneously with another defense objection, causing the incident dramatized in Respondents' Brief. The foregoing situation was unquestionably caused by the fact that the Trial Court Judge *never* conducted a hearing on the matter, even though the court initially indicated that it would fully explore the incident at the time of its ruling on post-trial Motions. [Transcript of Motion and Closing Argument, R. 35, pp. 5965-5966, A. 2656-2657.] Thus, neither counsel nor witness was ever afforded a full opportunity to explain, on the record, the reasons for which the answer was given and to demonstrate not only that the answer was not violative of any prior Court ruling but was entirely justified by the circumstances.

The second portion of Respondents' assumption, that the statement was "whispered" or "mumbled" under the

witness' breath, is specifically contradicted by the record. The quoted words are those of the Trial Judge—and the record affirmatively reflects that he did not hear the witness answer at all. [A. 1646, R. 22, p. 3702; R 35, pp. 5966 and 6244; R. 2657 and 2676.] The language quoted by Respondents in their Brief *was* spoken by the Trial Judge, but it is no more than a paraphrase of the contentions made by defense counsel at the time of trial—contentions made outside of the presence of the witness and at a time when there was *no* opportunity available to fully explore the subject incident. Even so, in the informal discussion held in Chambers where the subject first came to light, the contention that the answer was whispered was specifically contradicted by the Court Reporter, the only official present who *did* hear the witness' answer. He stated, contrary to the Respondents' statement herein, that the answer came simultaneously *with* (rather than *after*) an objection by counsel and that the answer was *not* whispered. Witness the following language:

> THE REPORTER: "We have this problem, that when two people speak at one time, overlap, it is necessary that one be written while the statement of the other must be retained and written at the completion of the first. In other words, there is no way to show in the record that it's said simultaneously. So, actually, the record cannot show the exact manner in which it was said."
>
> THE COURT: "*Did he say it kind of under his breath?*"
>
> THE REPORTER: "It was about like this. *My memory of it is that it was said above a whisper, but rather rapidly.*"

THE COURT: "I don't know, I was listening to the lawyers object or something, *I didn't hear it.*"

The above presents the not unusual courtroom situation which occurs when a witness' answer is interrupted by a lawyer's objection. The witness is apt to lower his voice, although still completing his answer. In the instant circumstance, it was simply a case of two people talking at the same time, with the lawyer obviously speaking louder than the witness. Had an evidentiary hearing been held, either before or after the verdict was returned, we are confident it would reflect that there was no surreptitious "whispering," or other clandestine communication of "improper" matter to the jury as argued by the oil companies.

Unfortunately, the Trial Judge was obviously determined to take *some* action as a result of the above described incident, even though all the facts were not before him; and it is perfectly apparent that he erred in attempting to meet the situation by giving an instruction premeditatedly designed to "bridle" the jury by inducing it to render a verdict *smaller* than that justified by the evidence. Other avenues were readily available. Had the trial court permitted the jury to reach a verdict unaffected by the knowledge it would be trebled, then, after a consideration of the amount of the verdict as it related to the evidence, the Trial Judge could have directed a remittitur of any amount he felt might represent reimbursement for expenses. Or, the court could have remedied any misconception about expenses by merely instructing the jury that successful plaintiffs would recover "expenses," as a matter of course *without also* telling the jurors that the amount of their verdict was to

be multiplied times three. The judgment on the verdict would then reflect the jury's *true* finding as to the actual damages, reduced by such amount as the court then deemed justified by the remark to the jury. Such conduct would have totally eliminated any prejudice claimed by the defendants, and the entire procedure, itself, could have been reviewed on appeal. The trial court's failure to adopt the standard procedure in such circumstances permitted prejudicial, irrelevant information to be furnished the jury.

A general verdict was not returned in this case, and the utter absurdity of giving an "instruction" *at all* in circumstances where the jury's *only* function was to *fill in blanks* in a set of Special Verdict Interrogatories calling *only* for the "cents per gallon" overcharge must be apparent. Quite obviously, the jury did not need to be "instructed" in this regard at all. The improper instruction was given *solely* for *punitive* purposes at the request of the defendants, and that is a fact as incandescent as the mid-day sun. Its sole purpose was to punish plaintiffs for the *alleged* misconduct of a witness. If one were to assume, *arguendo*, that there was a problem created by the answer given by the witness (and the record is to the contrary) it is difficult to conceive of a "solution" any more fundamentally at odds with basic due process than the action taken by the trial court.

B. Applicable Law

As advocates we are unable to disguise our admiration of the adroitness with which counsel has presented the contention that there is no present conflict between the Circuits concerning whether the "trebling" instruction should be given. However, when that argument is exposed to the exact language used by the various courts considering the question, it falls of its own weight. Respondents' contention is based on the rather mundane assertion that the courts have recognized that "differing circumstances justify different conclusions"; quoted in support is the dictum in *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 135 F.Supp. 4, 11 (D.C. D.C. 1955), in which that Court recognized, *in those jurisdictions in which the pleadings were furnished to the jury*, that a prayer for treble damages might confuse the jury. However, the conflict between the Second and Tenth Circuits has been specifically recognized by the latter Circuit in *Semke* v. *Enid Automobile Dealers Association*, 456 F.2d 1361 (10th Cir. 1972), in its holding that the giving of such instruction was "error."

CONCLUSION

The oil companies commenced their defense in the case at bar by portraying these plaintiffs as "treble damage bounty hunters." [Supp. R. 1, p. 3, *et seq.*; and p. 14, *et seq.*] The treble damage "instruction" at the close of all the evidence permitted the defense to conclude on a similar note. When price-fixing defendants are allowed to portray the victims of their illegal conspiracy as fortune hunters seeking damages far in excess of the injuries suffered, a result

can be anticipated which does violence to the purpose for which the treble damage provision of *The Clayton Act* was devised. We respectfully suggest that our Courts, including this one, should not aid price-fixers in the attainment of such a result.

Respectfully submitted,

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August, 1973

CERTIFICATE

This is to certify that the attached Brief in Opposition has been served by mailing three copies thereof to counsel for each petitioner.

Dated this ..... day of August, 1973.

.....

John Anthony Claro